NO. 90-1674

Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. BAILEY
2000 Post Oak Blvd., #1760
Houston, Texas 77056
(713) 626-5051

Counsel of Record
for Petitioners

QUESTIONS PRESENTED

I. Whether the rule, as confirmed by the Supreme Court in United States v. Boyle, 469 U.S. 241 (1985) -- that a taxpayer's reasonable reliance on the advice of his tax adviser that he need not file a return constitutes "reasonable cause" under Int. Rev. Code Sec. 6651(a) and thus prevents a late-filing penalty -- likewise applies to advice that the taxpayer need not timely file.[1/]

II. Whether an appellate court, in affirming a summary judgment, may refuse to accept the deposition testimony of the appellants' witness on the key question of fact.

[1/]The Fifth Circuit fully discussed this point and obviously leaned in favor of an affirmative answer. But it stopped short of deciding it in order to avoid a possible conflict with another circuit court (or courts). The court, in a shocking holding, decided this case on another ground which is totally indefensible on a summary-judgment appeal; it is the issue raised in the second "question presented" above.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii-iii
TABLE OF AUTHORITIES	iv-v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
THE STATUTE INVOLVED AND THE APPLICABLE TREASURY REGULATION	2
STATEMENT OF THE CASE	3
BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT	9
ARGUMENT -- REASONS FOR GRANTING THE WRIT	9
I. THIS COURT SHOULD CLARIFY, IN A BRIEF PER CURIAM DECISION, THAT ONE OF ITS "BRIGHT LINE" PRONOUNCEMENTS IN UNITED STATES V. BOYLE, 469 U.S. 241 (1985) -- THAT A TAXPAYER'S REASONABLE RELIANCE ON THE ADVICE OF HIS TAX ADVISER NOT TO FILE A RETURN CONSTITUTES "REASONABLE CAUSE" -- APPLIES NO LESS TO ADVICE NOT TO TIMELY FILE	10

	Page
II. THIS COURT SHOULD STRIKE DOWN, AGAIN IN A PER CURIAM DECISION, THE FIFTH CIRCUIT'S SHOCKING HOLDING THAT IT NEED NOT ACCEPT, ON THE TAXPAYERS' APPEAL FROM A SUMMARY JUDGMENT, THEIR C.P.A.'S DEPOSITION TESTIMONY ON THE KEY QUESTION	14
CONCLUSION	21
CERTIFICATE OF SERVICE	21
APPENDIX A -- FIFTH CIRCUIT OPINION	1a
APPENDIX B -- DISTRICT COURT OPINION	28a
APPENDIX C -- DISTRICT COURT JUDGMENT	41a
APPENDIX D -- DISTRICT COURT DENIAL OF MOTION FOR RECONSIDERATION	42a
APPENDIX E -- FIFTH CIRCUIT DENIAL OF PETITION FOR REHEARING	43a
APPENDIX F -- FIFTH CIRCUIT DENIAL OF MOTION FOR LEAVE TO FILE A SUGGESTION FOR REHARING EN BANC OUT OF TIME	44a

TABLE OF AUTHORITIES

Page

Statute

Int. Rev. Code: Sec. 6651(a) 2

Treasury Regulations

26 C.F.R. §301.6651-1(c)(1) 2

Federal Rules of Civil Procedure

F.R.C.P.: Rule 56(c) 16

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 17

Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879 (5th Cir. 1986) (per curiam) 17, 20

Bishop v. Wood, 426 U.S. 341 (1976) 20

Brunswick v. Vineberg, 370 F.2d 605 (5th Cir. 1967) 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 19

Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365 (5th Cir. 1951), cert. denied 341 U.S. 934 (1951) 19

	Page
Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987)	18
New York Life Ins. Co. v. Baum, 707 F.2d 870 (5th Cir. 1983)	19
Southmark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984)	17
United States v. Boyle, 469 U.S. 241 (1985)	9, 10
United States v. Diebold, 369 U.S. 654 (1962)	20
Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940)	18

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners
vs.
UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court (S.D. Tex. 1990) is not officially reported. The opinion of the Fifth Circuit is reported at 920 F.2d 301 (5th Cir. 1991). Copies of both opinions and related orders are reprinted in the appendix.

STATEMENT OF JURISDICTION

The Fifth Circuit decision was entered January 4, 1991. On January 30, 1991, the Fifth Circuit denied our Petition for Rehearing.

The statutory provisions believed to confer jurisdiction are as follows: 28 U.S.C. §1331 (the federal-question statute) and 28 U.S.C. §1254 (review of decisions of the courts of appeals by writ of certiorari).

THE STATUTE INVOLVED AND THE APPLICABLE TREASURY REGULATION

Internal Revenue Code:
Section 6651(a)(1) --

> In case of failure . . . to file any return . . . on the date prescribed therefor . . ., unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent of the aggregate.

Treasury Income Tax Regulations:
26 C.F.R. §301.6651-1(c)(1) --

> (c) Showing of reasonable cause. (1) . . . If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. . . .

STATEMENT OF THE CASE

The petitioners ("taxpayers"), Victor D. and Sandra J. Denenburg, Plaintiffs-Appellants below, are husband and wife. References to the "taxpayer" are to Mr. Denenburg.

The petitioners' complaint presented two causes of action. The first was whether they had reasonable cause for the late filing of their federal income tax return for 1978. Their second cause of action presented the same issue as to their 1979 return.

The government presented essentially no evidence of its own in the district court, and filed no controverting affidavit. Most of the evidence was in the form of the depositions of the taxpayer's C.P.A., F. Jerome Sweeney, and the taxpayer, Victor Denenburg. The evidence showed:

Reason for Delayed Filing:
A Major Unresolved Problem

Since about 1972 Victor Denenburg and his two brothers had owned and operated a corporation known as David Rents, Inc., which was engaged in the business of equipment rental. In 1978 the brothers were not getting along and Mr. Denenburg tried to resolve their differences by arranging to have his brothers' shares acquired by the corporation.

The acquisition of his brothers' stock occurred in 1978. Tax problems arose from the fact that the final signed agreements, unlike previous drafts, appeared to cast the transaction in the form of a purchase by Mr. Denenburg rather than by the corporation as he had intended and understood. (Either way, from that point forward, with his brothers having been bought out Mr. Denenburg was the sole owner.)

The corporation's records reflected the transaction as a stock redemption, and it was so reported in the corporation's 1978 return.

Corporate funds were used in acquiring the brothers' stock. Therefore, there would be substantially different tax treatment if Mr. Denenburg, rather than the corporation, were to be deemed the purchaser. A corporate stock redemption would have had no tax effect on the taxpayer individually. But if the purchase were deemed to have been made by Mr. Denenburg acting for himself (rather than as agent for the corporation), the use of corporate funds to acquire the stock would constitute "constructive dividends" to Mr. Denenburg. The result would be a very large increase in the Denenburgs' personal income tax liability.[2/]

[2/]This was not the only tax issue hinging on a determination of who was the purchaser. The purchase agreement also provided for payments for ten years to the taxpayer's brothers for their covenants not to compete. The consideration allocated to the covenants was $600,000. To the extent that all or any part of the

[ftnt. contd.]

Following his accountants' advice, Mr. Denenburg began long-drawn-out negotiations with his brothers in an attempt to persuade them to agree to amend the stock-purchase documents to clarify that the corporation (not he) was the purchaser.

However, in spite of Mr. Denenburg's attempts, over many months, to obtain such clarifying amendments, the issue remained unresolved. As to each tax year involved, there was evidence (and none to the contrary) that the reason for the delayed filing was the C.P.A.'s advice that it was not necessary to

---

2/Contd....

consideration for the non-competition covenants might be reallocated by the IRS from the corporation (as payor) to Mr. Denenburg individually, and if then re-characterized as additional consideration paid for the stock (as part but not all of it was in the final settlement with the IRS), such would also constitute "constructive dividends" to Mr. and Mrs. Denenburg.

timely file, under these circumstances. Here is what the evidence showed:

The C.P.A.'s advice to delay the 1978 return. On his deposition, the taxpayer's C.P.A. (Mr. Sweeney) testified as follows in answer to what the Fifth Circuit called "the key question":

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was certainly not what we would as a firm propose to do. [Emphasis added.]

Consistently with his accountants' advice, Mr. Denenburg felt "if we couldn't do the return properly, it would be better to hold off until we got the issue resolved." Mr. Denenburg relied on his accountants'

professional opinion and advice in making this decision.[3/]

The district court denied the taxpayers' motion for summary judgment and granted the government's motion for summary judgment. The district court held that, as a matter of law, the taxpayers' failure to timely file their income tax return for each year was not due to "reasonable cause" under Section 6651(a)(1) of the Int. Rev. Code. The Fifth Circuit affirmed.

[3/]As to each year's return, the taxpayers' accountants had obtained extensions to the last extendable due date, October 15 of the subsequent year. Their 1978 return, which thus was due October 15, 1979, after first having been filed without their signatures on November 14, 1980, was filed with their signatures on December 15, 1980. Their 1979 return, which was due October 15, 1980, was filed on May 19, 1981. The IRS assessed late-filing penalties of $14,153.77 for 1978 and $43,157.74 for 1979, under Int. Rev. Code Sec. 6651(a)(1). The taxpayers paid the assessed penalties plus interest on June 29, 1984, in amounts totalling $26,353.30 for 1978 and $76,665.24 for 1979. In October 1984 the taxpayers filed a claim for refund for each year, and subsequently filed this suit for refund.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction of this case under 28 U.S.C. §1346(a)(1).

ARGUMENT -- REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD CLARIFY, IN A BRIEF PER CURIAM DECISION, THAT ONE OF ITS "BRIGHT LINE" PRONOUNCEMENTS IN UNITED STATES V. BOYLE, 469 U.S. 241 (1985) -- THAT A TAXPAYER'S REASONABLE RELIANCE ON THE ADVICE OF HIS TAX ADVISER NOT TO FILE A RETURN CONSTITUTES "REASONABLE CAUSE" -- APPLIES NO LESS TO ADVICE NOT TO TIMELY FILE.

II.

THIS COURT SHOULD STRIKE DOWN, AGAIN IN A PER CURIAM DECISION, THE FIFTH CIRCUIT'S SHOCKING HOLDING THAT IT NEED NOT ACCEPT, ON THE TAXPAYERS' APPEAL FROM A SUMMARY JUDGMENT, THEIR C.P.A.'S DEPOSITION TESTIMONY ON THE KEY QUESTION.

- - - -

I.

THIS COURT SHOULD CLARIFY, IN A BRIEF PER CURIAM DECISION, THAT ONE OF ITS "BRIGHT LINE" PRONOUNCEMENTS IN UNITED STATES V. BOYLE, 469 U.S. 241 (1985) -- THAT A TAXPAYER'S REASONABLE RELIANCE ON THE ADVICE OF HIS TAX ADVISER NOT TO FILE A RETURN CONSTITUTES "REASONABLE CAUSE" -- APPLIES NO LESS TO ADVICE NOT TO TIMELY FILE.

In the first part of Part III ("DISCUSSION") of its opinion, the Fifth Circuit discussed, in scholarly fashion (citing decisions interpreting Boyle, supra), the question of whether advice not to timely file can constitute "reasonable cause" just as advice not to file at all can, as follows:

> The government, in its brief to this court and in oral argument, acknowledged that a taxpayer should not be penalized when failure to file his return by the due date results from circumstances beyond his control, citing Boyle, 469 U.S. at 248 n. 6, 105 S.Ct. at 691 n. 65 and Roberts, 860 F.2d at 1241. But in his oral argument to this court counsel for the government insisted that under no circumstances should professional advice of an accountant or lawyer relate to a taxpayer's inability to file returns in a timely manner and, accordingly, that such advice can never be the basis for applying the "reasonable cause" exception to I.R.C. § 6651. . . .

Neither the Taxpayer nor the government has directed us to a Fifth Circuit case squarely on point, and we are aware of none. Each case cited to this court by the Taxpayer or the government or both falls into one of four categories:

[The Fifth Circuit then discussed four categories of decisions, ending with category (4), as follows:]

(4) The taxpayer's reliance on the advice of his accountant or tax attorney that no return is due does constitute "reasonable cause" for delay.

Accepting, in arguendo, the Taxpayer's version of the facts in this case, it would clearly be distinguishable from the cases in the first three categories. And, while it would closely resemble the cases in the fourth category, the instant case may be distinguishable even from those -- as the government contends. . . .

Indeed, the Boyle court distinguished the case before it (category 1) from cases in category 4 by noting that "[t]his case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law." Boyle, 469 U.S. at 250, 105 S.Ct. at 692 (citing category 4 cases as examples of justifiable reliance on expert advice about a question of law). The rationale for treating a category 4 case as constituting "reasonable cause" for delay is that "it is reasonable for the taxpayer to rely on the substantive advice of the professional" that it is unnecessary to file a return because "[r]equiring the taxpayer to confirm

independently that advice would 'nullify the very purpose of seeking the advice of a presumed expert in the first place.'" Jackson v. Commissioner, 864 F.2d 1521, 1527 (10th Cir. 1989) (quoting Boyle, 469 U.S. at 251, 105 S.Ct. 692).

Thus, just as cases in the fourth category involve questions of tax law about whether taxpayers must file returns at all, it follows in the instant case that whether the Taxpayer's difficulty in resolving the discrepancy in the stock purchase agreement constituted "reasonable cause" for delay under I.R.C. § 6651(a)(1) may well have involved questions of tax law about which the Taxpayer might justifiably rely on the CPA for advice. [Fifth Circuit's footnote 8 omitted.]

This conclusion is consistent with Boyle but would appear to conflict with the post-Boyle holding in Ballard v. Commissioner, 854 F.2d 185, 187 (7th Cir. 1988). In Ballard the Seventh Circuit seems to have afforded Boyle an overly broad interpretation, construing it to hold that "a taxpayer who does not file any return on the advice of his attorney has shown 'reasonable cause' but a taxpayer who has been advised that a late filing will result in no penalty had not." We read Boyle's holding more narrowly, simply that the "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent" to make the filing for him. Boyle, 469 U.S. at 252, 105 S.Ct. at 693. Under our reading, Boyle did not, as read by the Seventh Circuit, decide whether the failure to file a return timely can be excused by the taxpayer's reliance on

> the advice of an expert about a question of law that, for example, "reasonable cause" for delay does exist. Indeed, on at least two occasions, the Eighth Circuit has left open the possibility that a taxpayer's reliance on the advice of counsel that "reasonable cause" for delay exists might itself constitute "reasonable cause."
>
> If this court now were to make a pronouncement either (a) that under no circumstances can advice from an accountant or an attorney constitute reasonable cause for late filing when the taxpayer is aware that a return must be filed and is aware of the deadline, or, (b) that under a given set of facts such advice could constitute reasonable cause, we might unwittingly create a conflict with one or more other circuits and, more importantly, would be doing so in obiter dictum. Doing that in this case is unnecessary. . . .

We suggest that, in a brief per curiam decision, this Court should resolve a possible conflict between the circuits by simply clarifying that its pronouncement in Boyle, that reasonable reliance on a tax adviser's advice constitutes "reasonable cause", applies to advice not to timely file, just as it does to advice not to file at all. Indeed, to us it seems almost laughable that one would contend

the contrary. If anything, considering that the purpose of the penalty is to discourage a perpetual failure to file, the law should shower greater disfavor on advice not to file at all rather than advice to merely postpone filing.

II.

THIS COURT SHOULD STRIKE DOWN, AGAIN IN A PER CURIAM DECISION, THE FIFTH CIRCUIT'S SHOCKING HOLDING THAT IT NEED NOT ACCEPT, ON THE TAXPAYERS' APPEAL FROM A SUMMARY JUDGMENT, THEIR C.P.A.'S DEPOSITION TESTIMONY ON THE KEY QUESTION.

On this appeal from a summary judgment, the record shows that the petitioners' C.P.A. testified on his deposition, in answer to what the Fifth Circuit described as "the key question" (which will be set forth below), that he had advised the taxpayer that it was not necessary to timely file a return. "I am certain that I said that," the C.P.A. answered.

(The C.P.A.'s statement "I am certain that I said that" pertained to the return for 1978; he gave a similar answer to a similar question as to the 1979 return.)

In upholding a summary judgment in favor of the government, the Fifth Circuit refused to accept this uncomplicated deposition testimony, apparently disbelieving the C.P.A.[4/]

The "key question" to the C.P.A. was:

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?

As stated above, the C.P.A. answered: "I am certain that I said that." The rest of the C.P.A.'s answer did not detract from this affirmation. At the very least, the C.P.A.'s answer was evidence from which the taxpayers were entitled to a favorable inference against the government's motion for summary judgment.

[4/]Although never flatly saying it rejected the C.P.A.'s testimony, the Fifth Circuit obviously did so. After quoting the C.P.A.'s answer, the court cast aspersions on it and obviously discarded it.

In short, since this was an appeal from a summary judgment, the Fifth Circuit's decision makes no sense. The Fifth Circuit correctly designated a question put to the C.P.A. as "the key question." Although the C.P.A. answered it squarely in the appellants' favor, the Fifth Circuit affirmed the summary judgment!

On the taxpayer's appeal from a summary judgment, the Fifth Circuit erred in refusing to accept his C.P.A.'s testimony on a material fact as F.R.C.P. 56(c) requires. The Fifth Circuit criticized and doubtless disbelieved the C.P.A.'s testimony, but credibility and weight are for the fact-finder and this case has not yet been tried on its facts, having been decided on a motion for summary judgment.

On an appeal from a summary judgment it is fundamental that the evidence (including all reasonable inferences therefrom) must be interpreted in the light most favorable to the appellant.

Basic summary-judgment law. The credibility of a witness is not a matter for the District Court on a motion for summary judgment -- nor for an appellate court on appeal from a summary judgment. On summary-judgment motions, and appeals from summary judgments, the evidence favoring the "non-movant", or the appellant, must be accepted. Additionally, all reasonable inferences therefrom must be drawn in the appellant's (or non-movant's) favor. The Fifth Circuit's decision is therefore contrary to the summary-judgment law as announced by this Court as well as in prior decisions of the Fifth Circuit, as set forth in footnote 5 below.[5/]

[5/]Basic summary-judgment law applicable here: Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir. 1984)). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[ftnt. contd.]

It is necessary that this Court restore normality to summary-judgment decisions and

---

5/Contd....

These cases were so cited by the Fifth Circuit in this case. See also the following Fifth Circuit and Supreme Court decisions to a similar effect:

On one party's motion for summary judgment, the courts must accept any competent evidence presented by the opposing party as true. Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987).

Over fifty years ago, Judge Hutcheson stated some of the controlling principles in Whitaker v. Coleman, 115 F.2d 305, 306, 307 (5th Cir. 1940), as follows:

> The . . . [summary-judgment] procedure, valuable as it is for striking through sham claims and defences . . . , was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.
>
> To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. . . .

[ftnt. contd.]

appeals by reversing this aberration. This Court must bring the application of summary-judgment law back into conformity with its recent decisions in such cases as Celotex

---

5/Contd....

> Summary judgment procedure is not a . . . contrivance to take unwary litigants into its toils and deprive them of a trial. . . . Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Almost four decades later, in Brunswick v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967), Judge Goldberg warned:

> Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill . . . .

See also Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365, 367 (5th Cir. 1951), cert. denied 341 U.S. 934 (1951); and New York Life Ins. Co. v. Baum, 707 F.2d 870, 871 (5th Cir. 1983).

[ftnt. contd.]

Corp. v. Catrett, 477 U.S. 317 (1986), and particularly Anderson v. Liberty Lobby, Inc., supra.

5/Contd....

Supreme Court cases:

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), supra, the Supreme Court said:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. . . . [T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. [Emphasis added.]

See also Bishop v. Wood, 426 U.S. 341, 344 (1976), and United States v. Diebold, 369 U.S. 654, 655 (1962).

CONCLUSION

For either or both of the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

JOHN A. BAILEY
2000 Post Oak Blvd., #1760
Houston, Texas 77056
(713) 626-5051

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari have been served this 29th day of April, 1991, by United States Mail, postage prepaid, addressed to:

Shirley D. Peterson
Assistant Attorney General
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044
Attn: Gary R. Allen
Chief, Appellate Section

JOHN A. BAILEY

APPENDIX A

Victor D. DENENBURG and wife,
Sandra J. Denenburg,
Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 90-2257.

United States Court of Appeals,
Fifth Circuit.

Jan. 4, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD and WIENER, Circuit Judges, and VELA *, District Judge.

WIENER, Circuit Judge:

Victor D. Denenburg (Taxpayer), and his wife, Sandra J. Denenburg, plaintiffs-appellants, paid penalties imposed by the

---

* District Judge of the Southern District of Texas, sitting by designation.

Internal Revenue Service (IRS), under the Internal Revenue Code of 1954 (I.R.C.) § 6651,[1] for late filing of personal income tax returns for 1978 and 1979, then filed this suit in district court seeking refund of those penalties. The government filed a motion for summary judgment which the district court granted after finding that the accounting advice relied on by the Taxpayer and his wife did not constitute "reasonable cause" under I.R.C. § 6651(a)(1)'s exception and thus did not excuse their failure to file their returns in a timely manner. The Taxpayers timely appealed. Agreeing with the district court's finding that "at no time were [the Taxpayers] told by [their accountant] that the returns need not be [timely] filed," we affirm.

---

1. 26 U.S.C. § 6651.

I.

BACKGROUND

Taxpayer and two of his brothers owned all of the capital stock of a corporation engaged in the equipment rental business. The three brothers experienced differences of opinion in 1978, which the Taxpayer attempted to resolve by arranging for the corporation to redeem all shares held by the other two brothers. The stock purchase agreement, however, specified that the stock belonging to Taxpayer's brothers would be purchased by the Taxpayer. Nevertheless, payments for purchase of that stock were made with corporate funds and recorded on the books of the corporation as purchases of treasury stock, in accordance with the brothers' original understanding.

When Taxpayer's accountant (the CPA) became aware of the provisions of the stock purchase agreement and the way payments had been made and recorded on the books of the corporation, he was concerned that the

Taxpayer might be charged with receiving constructive dividends, thereby generating substantial "phantom" ordinary income for the Taxpayer. After the Taxpayer confirmed to the CPA that the original deal struck by the brothers was for the corporation to redeem his brothers' stock, and that only through inadvertence did the stock purchase agreement call for the Taxpayer to purchase that stock personally, the CPA advised the Taxpayer to get his brothers to correct the stock purchase agreement to reflect that the corporation was the true party purchaser. The CPA obtained the maximum extension for Taxpayer's 1978 return. As of the extended due date (October 15, 1979), however, the conflict between the wording of the purchase agreement and the way the transaction had been negotiated and booked remained unresolved due to the continuing ill will between the Taxpayer and his brothers.

The Taxpayer and his wife did not file their signed 1978 return until December 15,

1980, a year and two months after the extended deadline of October 15, 1979. Because the problem with the stock purchase agreement persisted, the CPA also obtained extensions for Taxpayer's 1979 return to October 15, 1980, but the 1979 return was not filed until May 19, 1981, approximately seven months late.

The IRS assessed penalties against the Taxpayer and his wife pursuant to I.R.C. § 6651(a)(1) -- $14,153.77 for 1978, and $43,157.74 for 1979 -- for failure to file returns for those years by their respective due dates as extended. The Taxpayer paid the assessed penalties and interest, then filed a claim for refund with the IRS, asserting that based on the exception in I.R.C. § 6651(a)(1), he and his wife had "reasonable cause" for failing to file their returns timely. The IRS denied the claim, and the Taxpayer and his wife filed this suit for refund in district court.

II.

DISTRICT COURT PROCEEDINGS

The refund suit was filed in November of 1987. Depositions of the Taxpayer and the CPA were taken in October of 1988. Early in 1989, each party filed a motion for summary judgment together with an affidavit and memorandum of authorities. In October, 1989, the district court entered its order granting summary judgment for the government. The Taxpayer then filed a motion for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In January, 1990, the district court denied the Taxpayer's Rule 59(e) motion, after which a notice of appeal was timely filed on behalf of Taxpayer and his wife.

III.

DISCUSSION

This court reviews the grant of summary judgment motion de novo, using the same

criteria used by the district court in the first instance. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir.1984). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91

L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." Id.

Section 6651(a)(1) of the Internal Revenue Code specifies penalties for failure to file a tax return by the due date "unless it is shown that such failure is due to reasonable cause and not due to willful neglect."[2] Any "'cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return . . . will be accepted as reasonable.'" United States v. Boyle, 469 U.S. 241, 245 n. 1, 105 S.Ct. 687, 689 n. 1, 83 L.Ed.2d 622, 627 n. 1 (1985) (quoting Internal Revenue Manual (CCH) § 4350,(24) ¶22.2(3) (Mar. 20, 1980)). To demonstrate "reasonable cause," a taxpayer must show that he exercised "ordinary business care and

---

2. Willful neglect is not at issue in this case.

prudence." Treas. Reg. § 301.6651-1(c)(1) (as amended 1973). "[W]hether the elements that constitute 'reasonable cause' are present in a given situation is a question of fact, but what elements must be present to constitute 'reasonable cause' is a question of law." Roberts v. Commissioner, 860 F.2d 1235, 1241 (5th Cir.1988) (citing Boyle, 469 U.S. at 249 n. 8, 105 S.Ct. at 692 n. 8). On issues of fact, however, this court views the evidence in the light most favorable to the Taxpayer as nonmovant, bearing in mind that the Taxpayer and his wife bear the burden of proving that the failure to file timely resulted from "reasonable cause." See Roberts, 860 F.2d at 1241.

The government, in its brief to this court and in oral argument, acknowledged that a taxpayer should not be penalized when failure to file his return by the due date results from circumstances beyond his control, citing Boyle, 469 U.S. at 248 n. 6, 105 S.Ct.

at 691 n. 6 and Roberts, 860 F.2d at 1241. But in his oral argument to this court counsel for the government insisted that under no circumstances should professional advice of an accountant or lawyer relate to a taxpayer's inability to file returns in a timely manner and, accordingly, that such advice can never be the basis for applying the "reasonable cause" exception to I.R.C. § 6651. Nonetheless, in its brief to this court, the government stated unequivocally that reliance on professional advice may constitute reasonable cause for late filing.[3]

---

3. The logic of the government's brief is sometimes difficult to follow. On pages 7 and 8, it urges that the Taxpayer must be "unable" to file timely, in the physical or geographical sense, due to circumstances beyond his control. On page 9 the government posits that a taxpayer cannot delegate responsibility for timely filing to his accountant or attorney. Then, on page 10 of the brief, appears the statement, "That is not to say that reliance on professional advice may not constitute reasonable cause for late filing." (emphasis added)

Neither the Taxpayer nor the government has directed us to a Fifth Circuit case squarely on point, and we are aware of none. Each case cited to this court by the Taxpayer or the government or both falls into one of four categories:

(1) The taxpayer's reliance on an agent to comply with a fixed and unambiguous statutory deadline for filing returns does not

---

Mysteriously, that is the lead sentence of a paragraph devoted to distinguishing between late filing and not filing, in which the government concludes (in direct conflict with the opening sentence) that "Because it is undisputed that taxpayers were required to file their 1978 and 1979 returns in the case at bar, and knew of their obligation to file, that rule [reliance on professional advice that a return need not be filed at all] does not apply here." Next, from the bottom of page 10 to the top of page 12, the government's brief discusses splits in the circuits on cases in which the taxpayer was unaware of the due date. Finally, on pages 12 and 13, the government submits that other circuits "which have considered this particular question in light of Boyle have held that such advice does not constitute reasonable cause."

constitute "reasonable cause for delay."[4]

---

4. See, e.g., Boyle, 469 U.S. at 251, 105 S.Ct. at 692; Alton Ob-Gyn, Ltd. v. United States, 789 F.2d 515, 516 (7th Cir.1986) (interpreting Boyle as meaning that the failure of an agent to timely file tax returns does not constitute "reasonable cause"); Crouse v. United States, 711 F.2d 102, 104 (8th Cir.1983) (noting that taxpayers could not rely on attorney to timely file return when the taxpayers knew the due date); Laney v. Commissioner, 674 F.2d 342, 350 (5th Cir. Unit A Apr. 1982) (holding that the taxpayers could not successfully shift the blame for the late filing of the return to their accountant by arguing that they satisfied the requirements of I.R.C. § 6651(a)(1) by urging the accountant to file on time and that they cannot be blamed if he failed to do so); Fleming v. United States, 648 F.2d 1122, 1125 (7th Cir.1981) (holding that a taxpayer cannot blindly rely upon his agent to timely file a return or an extension); Millette & Associates, Inc. v. Commissioner, 594 F.2d 121, 124-25 (5th Cir.) (holding that the taxpayer cannot delegate the duty to timely file a return to an agent), cert. denied, 444 U.S. 899, 100 S.Ct. 207, 62 L.Ed.2d 135 (1979); Sanderling, Inc. v. Commissioner, 571 F.2d 174, 177 (3d Cir.1978) (noting that if the due date is known to the taxpayer, the taxpayer cannot blame the failure to timely file on an agent); United States v. Kroll, 547 F.2d 393, 396 (7th Cir.1977) (holding that the failure of the taxpayer's agent to present him with the return for his signature before the filing deadline "must put him on notice that reliance on the attorney or accountant is not an exercise of ordinary business care and prudence").

(2) The taxpayer's reliance on his agent to ascertain the correct filing date for returns does not constitute "reasonable cause" for delay.[5]

(3) The taxpayer's reliance on the advice of his agent that he need not meet a return filing deadline (or file a return at all) because no taxes are due does not constitute "reasonable cause" for delay.[6]

---

5. See, e.g., Estate of Kerber v. United States, 717 F.2d 454, 455-56 (8th Cir.1983), cert. denied sub nom. Doring v. United States, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985); Smith v. United States, 702 F.2d 741, 743 (8th Cir.1983) (executor had nondelegable duty to file a timely return, and reliance on the mistaken advice of a tax advisor as to the due date is not sufficient to constitute "reasonable cause" for failing to fulfill that duty (following Boeving v. United States, 650 F.2d 493, 495 (8th Cir.1981) and Estate of Lillehei v. Commissioner, 638 F.2d 65, 66 (8th Cir.1981))).

6. See, e.g., Jackson v. Commissioner, 864 F.2d 1521, 1527 (10th Cir.1989) (holding that the taxpayer must bear the risk of an expert's advice concerning the amount of tax owed when the taxpayer fails to comply with

(4) The taxpayer's reliance on the advice of his accountant or tax attorney that no return is due does constitute "reasonable cause" for delay.[7]

---

a known duty to file a return); Ballard v. Commissioner, 854 F.2d 185, 189 (7th Cir.1988) (holding that the taxpayer's reliance on the advice of her attorney that no penalty would result from a late filing since she would end up not owing any taxes, did not constitute "reasonable cause" for delay); see also Rubber Research, Inc. v. Commissioner, 422 F.2d 1402, 1407 (8th Cir.1970) (holding that an assertion on appeal that a company that failed to file a return one year had received legal advice that no tax was due did not amount to a showing of "reasonable cause").

7. See, e.g., Boyle, 469 U.S. at 250, 105 S.Ct. at 692; Fleming v. United States, 648 F.2d 1122, 1129 (7th Cir.1981); United States v. Kroll, 547 F.2d 393, 395-96 (7th Cir.1977); Commissioner v. American Ass'n of Eng'rs Employment, Inc., 204 F.2d 19, 21 (7th Cir.1953); Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558, 560 (5th Cir.1952); Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir.1950); Orient Inv. & Fin. Co. v. Commissioner, 166 F.2d 601 (D.C.Cir. 1948); Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3d Cir.1947); Estate of DiPalma v. Commissioner, 71 T.C. 324, 327 (1978).

Accepting, in arguendo, the Taxpayer's version of the facts in this case, it would clearly be distinguishable from the cases in the first three categories. And, while it would closely resemble the cases in the fourth category, the instant case may be distinguishable even from those -- as the government contends. The rationale of the holdings in the cases of the first three categories is that "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due.... Reliance by a lay person on [an expert tax advisor] cannot function as a substitute for compliance with an unambiguous statute." Boyle, 469 U.S. at 251, 105 S.Ct. at 693. Fixed statutory deadlines for filing tax returns, regardless of whether any taxes are due, are unambiguous. "Reasonable cause" is used in I.R.C. § 6651(a)(1) as a term of art. It is certainly the kind of wording that for all but the most sophisticated taxpayers

requires interpretation by an expert tax advisor.

Indeed, the Boyle court distinguished the case before it (category 1) from cases in category 4 by noting that "[t]his case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law." Boyle, 469 U.S. at 250, 105 S.Ct. at 692 (citing category 4 cases as examples of justifiable reliance on expert advice about a question of law). The rationale for treating a category 4 case as constituting "reasonable cause" for delay is that "it is reasonable for the taxpayer to rely on the substantive advice of the professional" that it is unnecessary to file a return because "[r]equiring the taxpayer to confirm independently that advice would 'nullify the very purpose of seeking the advice of a presumed expert in the first place.'" Jackson v. Commissioner, 864 F.2d

1521, 1527 (10th Cir.1989) (quoting Boyle, 469 U.S. at 251, 105 S.Ct. 692).

Thus, just as cases in the fourth category involve questions of tax law about whether taxpayers must file returns at all, it follows in the instant case that whether the Taxpayer's difficulty in resolving the discrepancy in the stock purchase agreement constituted "reasonable cause" for delay under I.R.C. § 6651(a)(1) may well have involved questions of tax law about which the Taxpayer might justifiably rely on the CPA for advice.[8]

This conclusion is consistent with Boyle but would appear to conflict with the post-Boyle holding in Ballard v. Commissioner, 854 F.2d 185, 187 (7th Cir.1988). In Ballard the Seventh Circuit seems to have afforded Boyle

---

8. Whether accurate tax returns for Taxpayer could have been timely filed was not a simple question. Complex and difficult calculations were required in order to produce an accurate tax return.

an overly broad interpretation, construing it to hold that "a taxpayer who does not file any return on the advice of his attorney has shown 'reasonable cause' but a taxpayer who has been advised that a late filing will result in no penalty had not." We read Boyle's holding more narrowly, simply that the "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent" to make the filing for him. Boyle, 469 U.S. at 252, 105 S.Ct. at 693. Under our reading, Boyle did not, as read by the Seventh Circuit, decide whether the failure to file a return timely can be excused by the taxpayer's reliance on the advice of an expert about a question of law that, for example, "reasonable cause" for delay does exist. Indeed, on at least two occasions, the Eighth Circuit has left open the possibility that a taxpayer's reliance on the advice of counsel that "reasonable cause" for delay exists might

itself constitute "reasonable cause."[9]

If this court now were to make a pronouncement either (a) that under no circumstances can advice from an accountant or an attorney constitute reasonable cause for late filing when the taxpayer is aware that a return must be filed and is aware of the deadline, or, () that under a given set of facts such advice could constitute reasonable cause, we might unwittingly create a conflict with one or more other circuits and, more importantly, would be doing so in obiter dictum. Doing that in this case is unnecessary. Even if we assume as urged by the Taxpayer that the rule is or should be that a

---

9. See Estate of Kerber v. United States, 717 F.2d 454, 455 (8th Cir.1983), cert. denied sub. nom. Doring v. United States, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985); Smith v. United States, 702 F.2d 741, 743 (8th Cir.1983).

taxpayer, who is told by a properly credentialed legal or accounting advisor that as a matter of tax law a taxpayer's return need not be filed by a due date known to the taxpayer, has reasonable cause not to file timely, we would still be required to affirm the holding of the district court.

The Taxpayer contends that he received such advice: that the CPA, who was at one time the tax partner in charge of the Houston office of the fourteenth largest accounting firm in the nation, advised the Taxpayer that as a matter of tax law and irrespective of the expiration of the ultimate extension dates for the returns in question, it was neither necessary nor proper for the Taxpayer to file those returns until the stock purchase agreement could be amended to confirm with the realities of the transaction. The district court found otherwise, and we agree. Neither the Taxpayer's deposition nor the CPA's deposition or affidavit provides support for

the Taxpayer's contention even when viewed, as it must be, in the light most favorable to the Taxpayer.

The Taxpayer's deposition reflects that he depended on his accountants to take care of extensions and of meeting deadlines. Doing that constitutes an unauthorized delegation of the Taxpayer's responsibility, not reliance on advice. When qusetioned about receiving such advice, the Taxpayer responded that he did not recall receiving any advice from the CPA or any other accountant to the effect it was not necessary to file the 1978 return on time. In fact, the Taxpayer said, "We all know that you are supposed to file a return within a timely manner. It was just the fact that if we couldn't do the return properly, it would be better to hold off until we got the issue resolved." At another point when the Taxpayer was asked, "Do you recall your CPA's ever informing you of the consequence of late filing?" he answered:

> "You know, I am sure that might have come up; I'm not positive about that. You know, back in '79, we were in the middle of a construction project. I knew that I had some offsets that would be coming to me, construction interests and so forth; and I knew that I -- I felt that we wouldn't have to pay taxes. And that was certainly another reason that I wasn't that concerned. It was a rather large project and I thought it would offset this completely.
>
> "Not that that's any justification for it by any means. It wasn't the -- it wasn't the reason, it was really that -- trying to get those papers amended. But I felt secure in my mind that we wouldn't have any taxes owed...."

When, in the same colloquy, the Taxpayer was asked, "But I gather, then, you didn't receive advice from [the CPA] or his firm that because no taxes would be owed, you didn't have to file the return on time?" he responded negatively.

More damaging to the Taxpayer's contention is the deposition testimony of the CPA. When asked what advice he gave the Taxpayer before passage of the October 15, 1979, deadline concerning the need to file on or before the deadline date, the CPA responded,

"Well, I think that I had not direct contact with him at that time....I don't recall that I had any personal contact with him. But at that stage it was nothing more than from my point of view of waiting to hear that the corrected or amended [sales contract] had been received."

When the CPA was asked the key question, "Did you ever advise [the Taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" the CPA's response was an artful example of neither cooking his client's goose nor confessing to professional negligence or worse: "I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was not certainly not what we as a firm would propose to do."

At another point when asked, "Did you ever discuss with [the Taxpayer] the exception to the failure to file timely penalty for reasonable cause and what was reasonable cause?", the CPA responded, "I know that we had some discussions on that. I don't know what they were specifically. I think that we discussed the reasonable cause issue with [the IRS auditor].[10] And I think it was her statement that cause us to go ahead and

---

10. In September of 1980, shortly before the October 15, 1980, filing deadline for the 1979 return, the IRS initiated an audit of the corporation's 1978 return. The IRS agent then extended the scope of the audit to include the Taxpayer's personal returns for 1978 and 1979. Under the urging and insistence of the IRS auditor, the Taxpayer's CPA prepared and submitted tentative returns for 1978 and 1979.

    The Taxpayer argued in its brief that his CPA contemplated filing both the 1978 and 1979 returns in October of 1980, but that "the turmoil of the newly-commenced IRS audit ... reasonably justified postponing the filing of these returns in the CPA's professional opinion.

prepare, as I said, tentative returns. I wasn't professional satisfied that was the right thing to do." The CPA also testified that, in response to the Taxpayer's telephone calls about filing returns, the CPA had responded, "Well, I won't file it unless those amended documents are there." Later, in response to a question about his own awareness of any provisions that excuse the late filing penalty if there is reasonable cause for late filing, the CPA responded, "I am not aware of that. I don't know what 'reasonable cause'

The onset of an audit in September of 1980 could not have constituted reasonable cause for delay in filing the 1978 return, which by extension had been due on October 15, 1979, almost one year before the audit commenced. Furthermore, we cannot know when the Taxpayer would have actually filed the returns had the IRS auditor not insisted that the returns be filed. And, after examining the record, we find no indication whatsoever that the CPA advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed because the IRS audit constituted reasonable cause for delay.

would be described to be. I think that we had reasonable cause not to file this -- not to prepare this return." (emphasis added)

Like his deposition testimony, the CPA's affidavit gallantly straddles the fence in a vain effort to support his client's failure to file returns timely, without at the same time inculpating the CPA's firm or perjuring himself.

The inescapable conclusion from careful readings of the depositions and affidavits is that the CPA never clearly and expressly advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed despite knowledge of the final, unextendable deadlines. Rather, the picture emerges of (1) an accounting firm unwilling to prepare and sign returns which were not supported by business documentation and which did not accurately reflect the true substance of the transaction; and (2) a taxpayer willing to miss known filing deadlines because his

accountants were unwilling to prepare returns acceptable to the Taxpayer who was himself incapable of preparing them on his own.

Those conclusions are admittedly inferential. A fact that is not inferential, however, but is abundantly clear from the summary judgment evidence is that the Taxpayer has not and cannot demonstrate reliance on tax law advice from the CPA sufficient to constitute reasonable cause for failure to file the subject return timely, even if we assume, without holding, that such advice could constitute "reasonable cause" for purposes of the exception contained in I.R.C. § 6651(a)(1).

For the foregoing reasons the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG,	)	[ENTERED OCT. 5, 1989]
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

Pending before the Court are the parties' cross-motions for summary judgment (Document #8 and #11). Having considered the motions, the responses, the memoranda in support and in opposition, and the applicable law, the Court is of the opinion that defendant's motion should be granted and plaintiffs' motion should be denied.

Plaintiffs filed this lawsuit seeking to recover late filing penalties, together with interest thereon, assessed by the Internal Revenue Service ("IRS") after the plaintiffs

failed to timely file their 1978 and 1979 income tax returns.

Plaintiffs income tax return for taxable year 1978, after extensions, was due October 15, 1979. It was filed on November 14, 1980, a year later. The plaintiffs' 1979 income tax return was also late. It was due, after extensions, on October 15, 1980, but was not filed until May 19, 1981.

Because their returns were late, plaintiffs were assessed penalties by the Internal Revenue Service in the amounts of $14,153.77 for 1978 and $43,157.74 for 1979. Plaintiffs paid the penalties, plus interest, and filed a claim for refund. The refund claim was denied. Thereafter, plaintiffs instituted this suit contending that the penalty was unjustified because their failure to file the return on time was "due to reasonable cause."

Defendant now moves for summary judgment on the ground that plaintiffs failed to

establish reasonable cause as a matter of law as required by section 6651(a)(1), of the Internal Revenue Code, and thus, it is entitled to judgment. Plaintiffs also move for summary judgment claiming that it was impossible for them to file their return on time, and therefore, they have established "reasonable cause" pursuant to section 6651(a)(1), as a matter of law, and thus, they are entitled to judgment.

Therefore, the sole issue for this Court to address is whether plaintiffs had reasonable cause, as a matter of law, for failing to timely file their income tax returns for taxable years 1978 and 1979.

The Internal Revenue Code Section 6651(a)(1) reads in pertinent part that:

> In case of failure . . . to file any return . . . on the date prescribed therefor . . ., **unless it is shown that such failure is due to reasonable cause and not due to wilful neglect**, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not more than 1 month, with an

> additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent of the aggregate.

26 U.S.C. § 6651(a)(1).

To escape the penalty for filing late returns, plaintiffs have the heavy burden of proving (1) that the failure to file the return did not result from wilful neglect, and (2) that the failure was due to reasonable cause. United States v. Boyle, 469 U.S. 241, 245, 105 S.Ct. 687, 689-90 (1985). Wilful neglect is not at issue in this case. Reasonable cause, while not defined in the Code, requires plaintiffs to demonstrate that they exercised "ordinary business care and prudence" but nevertheless were "unable to file the return within the prescribed time." 26 CFR § 301.6651(a)(1) (1984).

The Supreme Court has held that reasonable cause is established when a taxpayer reasonably relies on the advice of counsel that a tax return need not be filed, even

though that advice is later found to be erroneous. United States v. Boyle, 469 U.S. 249, 252, 105 S.Ct. 687, 693 (1985). They reasoned that ordinary business care and prudence does not require a taxpayer "to seek a 'second opinion,' or to try to monitor counsel on the provisions of the Code himself." Id. at 251, 105 S.Ct. at 692-693. To hold otherwise, the Court said, "would nullify the very purpose of seeking the advice of a presumed expert . . . ." Id., 105 S.Ct. at 693. However, the Supreme Court has held that "[i]t takes no special training or effort [for a taxpayer] to ascertain a deadline and make sure that it is met." Id. at 252, 105 S.Ct. at 693.

Based on the reasons set out below, the Court is of the opinion that the defendant's motion for summary judgment should be granted.

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a

matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). The United States has clarified the burden that a party must meet to obtain a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court stated that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552 (emphasis supplied). The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any,' which [he] believes demonstrate the absence of

a genuine issue of material fact." Id. at 323, 106 S.Ct. at 2553.

In determining whether a fact issue exists in this case, the Court is "guided by the Supreme Court's declaration that whether the elements that constitute 'reasonable cause' are present in a given situation is a question of fact, but what elements must be present to constitute 'reasonable cause' is a question of law." Roberts v. C.I.R., 860 F.2d 1235, 1241 (5th Cir. 1988).

Plaintiffs contend that their 1978 tax return was filed late because their accountant, F. Jerome Sweeney, discovered a discrepancy in their characterization of a corporate transaction, which would result in personal tax liability if uncorrected.[1]

---

[1]From 1972-1977, Mr. Denenburg and his two brothers owned a corporation called David Rents, Inc. In 1978, the brothers were not getting along so Mr. Denenburg decided to arrange to have his brothers' interests acquired by the corporation.

Victor Denenburg asserts that he attempted to correct the discrepancy but was unable to do so before the filing deadline. See Denenburg Deposition at 9. Mr. Sweeney advised plaintiffs that an extension in which to file the 1978 tax returns would expire October 15, 1979. See Sweeney Deposition at 5-22. Mr. Denenburg in his deposition acknowledged the fact that everyone knows that tax returns must be filed timely. Denenburg Deposition at 14. Nevertheless, plaintiffs failed to file the return until almost a year later.

The accounting records and written agreements of the transaction were not consistent. The corporate books reflected the transaction as a redemption of stock. The written agreement between the brothers indicated that the transaction was a purchase by Mr. Denenburg of his brothers' stock interest.

The discrepancy in the characterization of the transaction was discovered in September 1979 by Mr. Sweeney. The discrepancy was significant in that a redemption of stock by the corporation has no tax effects to Mr. Denenburg, while the purchase of stock using corporate funds would cause constructive dividends to Mr. Denenburg and significant taxable income. See Defendant's Memorandum in Support of Summary Judgment.

Plaintiffs further assert that their 1979 tax return was filed late because of an IRS audit that was ongoing since September of 1979.

In 1980, the IRS began an audit of the corporate income tax for 1978. Within a few months, the IRS audit extended to the Denenburgs' personal returns. Plaintiffs assert that the accountants determined that the filing of a proper or accurate return by the due date would be impossible. They contend that the IRS has recognized impossibility as constituting good cause for a late filing, citing United States v. Boyle in support. The Plaintiffs' reliance on Boyle is misplaced.

In Boyle the United States Supreme Court refused to refund penalties paid by a taxpayer for the mistake of his attorney on the ground that the taxpayer knew of the tax deadline and should have insured that the tax return was filed on time. Boyle was appointed executor

of his mother's estate. He retained Keyser to serve as attorney for the estate. Keyser advised Boyle that he needed to file a federal estate tax return, but he failed to mention the filing deadline to Boyle. Boyle cooperated fully with his attorney and obtained for him "all the relevant information and records." Id. at 243, 105 S.Ct. 688. Keyser advised Boyle that the return would be filed on time. The deadline came and passed. When Boyle called Keyser to check on the status of the return, he was told that the deadline had passed. Within two days Boyle had met with Keyser and the return was filed. Nevertheless, Boyle was penalized for his late filing, a decision upheld on appeal.

The result in Boyle was harsh considering the fact that the taxpayer cooperated fully with his lawyer and it was the lawyer who failed to file the returns on time. Here, Mr. Denenburg was told by Mr. Sweeney that the corporate agreement between his brothers had

to show that the stock was not purchased by Mr. Denenburg, but instead, was a redemption of stock. Without the corrected documents, Mr. Sweeney said, the tax returns for 1978 and 1979 would be materially incorrect. It was incumbent upon Mr. Denenburg to get the corrected documents. A dispute with his brothers does not constitute an impossibility to file tax returns. Plaintiffs were aware of the filing deadline, it was, therefore, they responsibility to file the returns on time. Their claim that Mr. Sweeney refused to file an incorrect return does not relieve them of the responsibility of filing a return, and thus, does not constitute reasonable cause as a matter of law.

The Court recognizes, a did the Supreme Court did in Boyle, that reliance on the advise of counsel that a tax return does not need to be filed constitutes reasonable cause. But, at no time were the plaintiffs told by Mr. Sweeney that the returns need not be

filed. Denenburg Deposition at 14. Plaintiffs did not have to be tax experts to know that tax returns have fixed filing dates and that taxes must be paid when due. Therefore, plaintiffs reliance on Mr. Sweeney's reluctance to file an improper return as a basis for establishing reasonable cause is insufficient as a matter of law.

Nor can the plaintiffs rely on the IRS audit or the IRS agent's investigation as a basis since the IRS agent never told Mr. Denenburg or Mr. Sweeney that a return need not be filed. See Sweeney Deposition at 19, Denenburg Deposition at 18. Additionally, while the IRS audit began in September 1980 for the 1978 return, the original audit only covered the corporate tax return. It was not until several months later, well past the October 15, 1980 deadline for the 1979 return, that the IRS investigation turned to the Denenburgs' personal returns. See Plaintiffs' Response to Summary Judgment at 5.

Defendant has informed this Court of the basis for its motion pursuant to Celotex Corp. v. Catrett. Thus the burden shifted to the plaintiffs "to go beyond the pleadings and by [their] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. at 324, 106 S.Ct. at 2553. This they have not done. It is therefore

ORDERED that Defendant's Motion for Summary Judgment, be and is hereby, GRANTED. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment, be and is hereby, DENIED.

SIGNED at Houston, Texas, on this 4th day of October, 1989.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

[ENTERED
OCT. 5, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG, Plaintiffs	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

Pursuant to the Order signed on this date, it is ORDERED that judgment be, and hereby is, entered in favor of Defendant and against Plaintiffs. It is further

ORDERED that Defendant recover from the Plaintiffs its costs of court.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 4th day of October, 1989.

Melinda Harmon
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG,	)	[ENTERED JAN. 11, 1990]
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA	)	
Defendant.	)	

ORDER

Pending before the Court is the Plaintiffs' Motion for Reconsideration of its October 4, 1989, Order (Document #21). Having considered the motion, the response and the reply thereto, and the applicable law, the Court is of the opinion that plaintiffs' motion should be denied. It is therefore

ORDERED that Plaintiffs' Motion for Reconsideration, be and is hereby, DENIED.

SIGNED at Houston, Texas, on this 10th day of January, 1990.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

[FILED. JAN 30, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and
wife, SANDRA J. DENENBURG,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(JANUARY 30, 1991)

Before GARWOOD, WIENER, Circuit Judges, and VELA*, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*District Judge of the Southern District of Texas, sitting by designation.

APPENDIX F

[FILED. APR 22, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and
wife, SANDRA J. DENENBURG,
Plaintiffs-Appellants,
versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

O R D E R :

IT IS ORDERED that appellants motion for leave to file a suggestion for rehearing en banc out of time is DENIED for lack of jurisdiction, this Court's judgment as mandate having been issued on February 11, 1991.

Jacques L. Wiener, Jr.
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

No. 90-1674

In the Supreme Court of the United States

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

CHARLES E. BROOKHART
CURTIS C. PETT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioners raised a genuine issue of fact as to whether there was reasonable cause for their failure timely to file 1978 and 1979 federal income tax returns.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986)	6
United States v. *Boyle*, 469 U.S. 241 (1985)	8

Statute and rule:

Internal Revenue Code, 26 U.S.C. § 6651(a)(1)	2-3, 6
Fed. R. Civ. P. 56(c)	6

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1674

VICTOR D. DENENBURG AND SANDRA J. DENENBURG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 920 F.2d 301. The opinion of the district court (Pet. App. 28a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1991. A petition for rehearing was denied on January 30, 1991 (Pet. App. 43a). A motion for leave to file a suggestion for rehearing en banc out of time was denied on April 22, 1991 (Pet. App. 44a). A suggestion for reconsideration of the order of April 22, 1991, was denied on May 20,

1991.[1] The petition for a writ of certiorari was filed on April 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Victor Denenburg and his brothers owned a corporation engaged in the equipment-leasing business.[2] In 1978, petitioner agreed to purchase his brothers' interests in the corporation. Petitioner used corporate funds to purchase their stock. Petitioner's accountant informed him that this use of corporate funds created taxable income for him because it would be treated as a constructive dividend. The accountant advised petitioner that he could avoid a tax on the constructive dividend by amending the stock purchase agreement to provide for purchase of the stock directly by the corporation. Petitioner was unable, however, to negotiate such an amendment with his brothers (Pet. App. 3a-4a).

Petitioners obtained extensions for the filing of their 1978 and 1979 federal income tax returns but failed to meet the extended deadlines. When petitioners thereafter made untimely filings of their returns, the Internal Revenue Service assessed failure-to-file penalties against petitioners under Section 6651(a)(1) of the Internal Revenue Code, 26 U.S.C.

---

[1] This order was entered after petitioners filed their petition for a writ of certiorari and is therefore not included in the appendix to the petition. Accordingly, a copy of that order is reproduced in the appendix to this brief (App., *infra*, 1a-4a).

[2] Sandra J. Denenburg, wife of Victor D. Denenburg, is a party in this suit solely because the Denenburgs filed joint returns for 1978 and 1979. The references to petitioner in this brief are to Victor D. Denenburg.

6651(a)(1). Petitioners paid those penalties and, after their administrative claim for refund was denied by the Internal Revenue Service, filed this action (Pet. App. 4a-5a, 24a n.10).

2. Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for a failure to file a tax return by the date due "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. 6651(a)(1). Petitioners asserted in the district court that they had reasonable cause for failing to file their 1978 and 1979 income tax returns within the extended deadlines because their accountant advised them that it was permissible for them to file the returns late. Both parties moved for summary judgment. Transcripts of a deposition of petitioner and a deposition and affidavit of his accountant were filed with the court. The deposition of the accountant contains the following colloquy (Pet. App. 23a):

> Q. Did you ever advise [Mr. Denenburg] with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A. I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially—and we knew it to be incorrect—was not certainly not what we as a firm would propose to do.

The district court granted summary judgment for the government (Pet. App. 28a-41a), holding that petitioners failed to establish a genuine issue of fact as to whether they had reasonable cause for their

failure to file the returns by the due dates because (1) there was no evidence that the accountant advised petitioners that they were not required to file the returns and (2) the reluctance of the accountant to file *improper* returns does not constitute reasonable cause for a failure to file a return as required by law (Pet. App. 38a-39a).

3. The court of appeals affirmed (Pet. App. 1a-27a). The court reviewed the evidence *de novo*, in the light most favorable to petitioners, and concluded that the accountant never advised petitioners that it was unnecessary to file the returns by the deadlines. Petitioners had thus failed to establish reasonable cause for their failure to make timely filings (Pet. App. 26a-27a).

In arriving at its decision, the court described the accountant's testimony as follows (Pet. App. 26a):

> Like his deposition testimony, the CPA's affidavit gallantly straddles the fence in a vain effort to support his client's failure to file returns timely, without at the same time inculpating the CPA's firm or perjuring himself.
>
> The inescapable conclusion from careful readings of the depositions and affidavits is that the CPA never clearly and expressly advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed despite- knowledge of the final, unextendable deadlines.

Since petitioners lacked evidentiary support for their claim that the accountant advised them that it would be permissible to file the returns after the extended deadlines, the court found it unnecessary to reach the question whether such advice could constitute reasonable cause for the failure to file timely returns (Pet. App. 19a-20a).

Petitioners filed numerous post-appeal motions for rehearing in which they urged that the accountant's deposition testimony (quoted above) provides support for their claim that he advised petitioners to file the returns late (App., *infra*, 1a-4a). In these motions, as in the petition filed in this Court (Pet. 14, 15), petitioners' counsel asserted that the accountant answered: "*I am certain that I said that.*" In denying these motions, the court of appeals felt compelled to "try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal" (App., *infra*, 2a). The court noted that "[c]ounsel continues to misrepresent" the testimony "to a degree closely approaching sanctionability" (*ibid.*) by transforming it in an erroneous and grossly misleading manner, and that it was obvious that the accountant did not, in reality, assert that he had advised petitioners that it was not necessary to file the returns on time (*id.* at 2a-4a). The court reiterated that, in concluding that the accountant did not advise petitioners that they need not file timely returns, the court had reviewed all the evidence in the light most favorable to petitioners, including the testimony in question, "but read[] it realistically nonetheless" (*id.* at 4a).

ARGUMENT

The court of appeals correctly held that petitioners failed to raise a genuine issue of fact as to whether their failure to file timely 1978 and 1979 federal income tax returns was due to reasonable cause. That fact-bound decision is based solely on the unique circumstances of this case. The decision does not conflict with decisions of this Court or of other courts of appeals. Further review by this Court is therefore not warranted.

1. Section 6651(a)(1) of the Internal Revenue Code imposes a civil penalty for a taxpayer's failure timely to file a tax return unless the taxpayer establishes that such failure was due to reasonable cause and not due to willful neglect. Petitioners contend that they had reasonable cause for the late filing of their 1978 and 1979 income tax returns because their accountant advised them that, in the circumstances, it would be proper for them to file the returns late. Because petitioners proffered no evidence indicating that the accountant in fact offered such advice, the grant of summary judgment to the government was correct.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). In this case, each party moved for summary judgment in the district court. A deposition of petitioner and a deposition and affidavit of his accountant were filed with the court. Petitioners contend (Pet. 14-15) that a statement made by the accountant in his deposition raises a genuine issue whether he advised petitioners to file their returns late.

The court of appeals, however, conducted a *de novo* review of all the evidence and, viewing it in the light most favorable to petitioners, concluded that the evidence does not support the claim that the accountant advised petitioners that it would be proper to file the returns late (Pet. App. 20a-27a). The court held that the evidence showed only that the CPA was unwilling to prepare and sign *incorrect* tax returns, a

fact that does not establish reasonable cause for late filing (Pet. App. 26a-27a). The court of appeals therefore affirmed the grant of summary judgment to the government (Pet. App. 27a).

Counsel for petitioners erroneously represents to this Court (Pet. 14, 15) that the accountant, in answer to the question whether he advised petitioners they could file late, stated "I am certain that I said that." On this basis, petitioners contend (*ibid.*) that this answer, so characterized, created a genuine issue of fact as to whether the accountant advised them that it was not necessary to file the returns in a timely manner. Petitioners pressed this same contention before the court of appeals after that court had rendered its decision (App., *infra*, 2a-4a). In response, the court of appeals observed that petitioners' transformation of the accountant's answer was misleading "to a degree closely approaching sanctionability" (*id.* at 2a). The court properly concluded that the accountant's statement, read in proper context, cannot be construed as an assertion that he advised petitioners that it would be proper to file their returns late (*id.* at 2a-4a).

Further, as the court of appeals noted (App., *infra*, 2a, 4a), petitioners misstate (Pet. 14-16) the holding of that court. The court of appeals did not reject or discredit the testimony of the accountant on the "key question" whether he advised petitioners that it would be proper to file the returns late. Instead, the court of appeals reviewed this testimony and the other summary judgment evidence in the light most favorable to petitioners, and properly drew the "inescapable conclusion" that the accountant did not offer such advice (App., *infra*, 2a, 4a).

Since this decision is based on the unique factual circumstances of this case, and does not conflict with decisions of this Court or of other courts of appeals, further review is not warranted.

2. In ruling as it did, the court of appeals did not decide whether reliance on professional advice may constitute reasonable cause for the late filing of a tax return. Because no such professional advice was given in this case, there is no reason to reach petitioners' assertions (Pet. 10-14) on this issue.

Their argument is, in any event, without merit. As in *United States* v. *Boyle*, 469 U.S. 241 (1985), the only question presented in this case was whether there was reasonable cause for petitioners' failure timely to file required federal tax returns. In this case, however, unlike in *Boyle*, there was no factual foundation for petitioners' claim that they relied on professional advice that they need not meet the filing deadlines. Nonetheless, this Court expressly held in *Boyle* that, even if such professional advice had been given, it would not constitute "reasonable cause" for a late filing. *Id.* at 252. Distinguishing the situation where an attorney has reviewed a question of tax law and advised the taxpayer "that it was unnecessary to file a return" (*id.* at 250), the Court noted that "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due" (*id.* at 251). The Court thus concluded in *Boyle* that (*id.* at 252):

> It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

CHARLES E. BROOKHART
CURTIS C. PETT
Attorneys

JUNE 1991

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and wife,
SANDRA J. DENENBURG, PLAINTIFFS-APPELLANTS

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

[Filed May 20, 1991]

BEFORE GARWOOD and WIENER, Circuit Judges, and VELA*, District Judge.

BY THE COURT:

IT IS ORDERED that appellants' suggestion for reconsideration of the court's previous order of April 22, 1991, denying appeallants' motion for leave to file out of time suggestion for rehearing en banc is DENIED. Just as was the case with appeallants' previous motion for leave to file a suggestion for rehearing en banc out of time, we lack jurisdiction to hear the instant motion. Henceforth the clerk of this

---

* District Judge of the Southern District of Texas, sitting by designation.

court shall not accept any attempted filing by or on behalf of appeallants in this matter.

Nonetheless, in as few words as possible, this court shall try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal. Possibly this third effort to do so shall have the proverbial charm.

This court has not, as counsel suggests, rejected or discredited the taxpayers' CPA plain answer to a "key question" of this case; neither have we refused to accept such testimony. Rather, counsel has misinterpreted the court's reading of the CPA's testimony—admittedly quite different from counsel's reading—as rejecting such testimony. This court has, however, relied heavily on the *total* testimony of the CPA in his affidavit and in his deposition.

Counsel continues to misrepresent the testimony of the CPA. Most telling, on page 5 of counsel's Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time, he transforms—to a degree closely approaching sanctionability—the initial clause of the understandably long, disjointed and rambling answer in the CPA's deposition, into a complete sentence by replacing the initial comma with a period, omitting the required ellipsis, and closing the quotation immediately following the period. Not only is that treatment erroneous, but it is grossly misleading.

The question posed to the CPA in his deposition was, "Did you ever advise [the taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" A person unfamiliar with the entire deposition or, for that matter, unfamiliar with the CPA's full reply to that question, would, upon reading counsel's shameless transformation of the initial clauses of the CPA's

response, assume (as counsel apparently intended) that the CPA answered the question in the affirmative, without qualification. That the CPA answered affirmatively is simply not the case.

Counsel tries to influence the unfamiliar reader to view the improperly truncated clauses as a complete sentence—as though the second "that" were the object of the verb "said" and, more importantly, as an informal, conversationally shortened substitute for the noun clause ". . . that it was not necessary to file the return on time for some reason." Had the CPA's answer been as thus *mis*represented, counsel would be correct and this court might likely have ruled differently. But counsel's version is not what the CPA said.

A proper analysis of the CPA's answer reveals first that the CPA did not truly respond to the question, and second that, by being unresponsive and somewhat evasive, the CPA was actually answering in the negative. The CPA began his response with "I am certain that I said . . ." followed by "that" as the beginning of a noun clause. But, before he completed the noun clause, the CPA inserted the parenthetical, independent clause "and I think it [i.e., what he said] was conveyed to him [the taxpayer], . . ." Having thus interjected the parenthetical thought about whatever he had said having been told to the taxpayer, the CPA completed his answer by repeating the word "that" and finishing the noun phrase as follows: "because of the substantial variation in the way the document was written with the way the books were returned at the corporation, that to file a return, that was materially—and we knew it to be incorrect—was certainly not what we would as a firm propose to do."

But when we translate the CPA's answer from "deposition-ese" and delete the independent clause, his response reads as follows:

> I am certain I said that to file a return which was materially incorrect, because of the substantial difference between the way the document was written and the way that the books were maintained at the corporation, was certainly not what we, as a firm, would propose to do.

As thus gramatically and syntactically reconstituted, the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that, as a matter of tax law, they need not file a return timely. Conversely, our interpretation of the CPA's answer is supported by reading it in the context of his entire deposition.

Counsel's insistence to the contrary notwithstanding, this court did apply the well recognized standard of review for summary judgment cases by viewing the summary judgment evidence in the light most favorable to the non-movant—but reading it realistically nonetheless.

We close with a caution to counsel for the taxpayers: We admire the favor with which he has represented his client in this case and the tenacity with which he has refused to take "No" for an answer. But we suggest that henceforth counsel temper his fervor and tenacity with professional objectivity and with constant awareness of his role as an officer of this court, particularly when, in briefs and memoranda, he represents quotations as true and complete, as well as when he characterizes the action of the court pejoratively.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20607

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

NO. 90-1674

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF THE APPELLANTS

JOHN A. BAILEY
2000 Post Oak Blvd., #1760
Houston, Texas 77056
(713) 626-5051

Counsel of Record
for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i-ii
TABLE OF CITATIONS	iii
SUPPLEMENTAL BRIEF OF THE APPELLANTS	1
PRELIMINARY STATEMENT	1
APPELLANTS' TWO POINTS IN RESPONSE TO THE FIFTH CIRCUIT'S MAY 20 ORDER	2
A. THE REVERSIBLE ERROR OF THE FIFTH CIRCUIT'S SUMMARY-JUDGMENT AFFIRMANCE CAN NO LONGER BE (IF IT EVER WAS) IN DOUBT BECAUSE, IN MAKING ITS INTERPRETATION OF CERTAIN DEPOSITION TESTIMONY, THE COURT REJECTED ANOTHER REASONABLE INTERPRETATION AS NOT BEING POSSIBLE, ALTHOUGH IT WAS AT LEAST AS LIKELY TO BE THE INTENDED AND CORRECT ONE	2
Controlling point	3
The deposition testimony in question	4
How the Fifth Circuit reads the C.P.A.'s deposition testimony	5
Summary of Part A	16

Page

B. THE IMPORTANCE OF THE SECOND QUESTION (AS WELL AS THE FIRST) PRESENTED IN OUR PETITION FOR CERTIORARI REMAINS UNDIMINISHED 17

CONCLUSION 18

CERTIFICATE OF SERVICE 20

APPENDIX G -- FIFTH CIRCUIT PANEL'S DENIAL OF SUGGESTION FOR RECONSIDERATION OF ITS APRIL 22, 1991 ORDER 1a

TABLE OF AUTHORITIES

Case	Page
Denenburg v. United States , 920 F.2d 301 (5th Cir., decided January 4, 1991) (the case at bar)	9

NO. 90-1674

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners
vs.
UNITED STATES OF AMERICA,
Respondent

SUPPLEMENTAL BRIEF OF THE APPELLANTS

PRELIMINARY STATEMENT

This Supplemental Brief is Appellants' response to the Fifth Circuit panel's May 20, 1991 order (hereafter referred to as the "May 20 order"), a copy of which is attached as APPENDIX G. In its five-page May 20 order the Circuit panel (asserting lack of jurisdiction) denied appellants' suggestion for reconsideration of its April 22, 1991 order denying appellants' motion for leave to file a suggestion for rehearing en banc out of time. The May 20 order was issued by the Fifth Circuit after our petition for certiorari was filed in this Court.

APPELLANTS' TWO POINTS IN RESPONSE TO THE FIFTH CIRCUIT'S MAY 20 ORDER

In this supplemental brief appellants' two broad points -- both of which relate to the second question presented in our petition for certiorari -- are as follows:

A. The reversible error of the Fifth Circuit's summary-judgment affirmance can no longer be (if it ever was) in doubt because, in making its interpretation of certain deposition testimony, the court rejected another reasonable interpretation as not being possible, although it was at least as likely to be the intended and correct one.

B. The importance of the second question (as well as the first) presented in our petition for certiorari remains undiminished.

- - - - -

A.

THE REVERSIBLE ERROR OF THE FIFTH CIRCUIT'S SUMMARY-JUDGMENT AFFIRMANCE CAN NO LONGER BE (IF IT EVER WAS) IN DOUBT BECAUSE, IN MAKING ITS INTERPRETATION OF CERTAIN DEPOSITION TESTIMONY, THE COURT REJECTED ANOTHER REASONABLE INTERPRETATION AS NOT BEING POSSIBLE, ALTHOUGH IT WAS AT LEAST AS LIKELY TO BE THE INTENDED AND CORRECT ONE

Controlling point

The salient point in this main part of our supplemental brief is that, on the taxpayers' appeal from a summary judgment, the appellate court could not legally exclude (as the Fifth Circuit erroneously did) the at least equal possibility that a jury reasonably could have interpreted appellants' C.P.A.'s deposition testimony the same way that both the appellants and (apparently) the appellee have interpreted it all along. And such a jury finding could not be overturned by a court.

The May 20 order (App. G) makes clear, for the first time, that the Fifth Circuit reads the C.P.A.'s answer to a question on his deposition exclusively a certain way (as explained below). In the court's view it cannot reasonably be interpreted another way. It plainly can be, however.

Appellants' interpretation of the C.P.A.'s deposition testimony is at least as logical and likely to be correct as the Fifth Circuit's interpretation. Furthermore, appellants' interpretation has no grammatical incorrectness or structural imperfection; the circuit court's has several, as later discussed.

The deposition testimony in question

The testimony in question, which is the C.P.A.'s answer to a question on his deposition, was as follows, in question-and-answer form, as it appears (except for our underlining) on page 13 of the deposition of the C.P.A., Mr. Sweeney:

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written

> with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was certainly not what we would as a firm propose to do. [Emphasis supplied.]

How the Fifth Circuit reads the C.P.A.'s deposition testimony

In its May 20 order (App. G) the Fifth Circuit said the C.P.A.'s answer is susceptible of only one interpretation. By that interpretation, either the second or third "that" should be disregarded as being repetitive (see p. 4, lines 5-6 of the May 20 order). The court said "the C.P.A. was actually answering in the negative" (id. at 3). And finally (id. at 4):

> the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that . . . they need not file a return timely. [Emphasis supplied.]

For clarification, we acknowledge that there are two possible ways to interpret the first words, "I am certain that I said that."* The Fifth Circuit's way is one way. Another way (at least equally logical) is to interpret the C.P.A.'s first words "I am certain that I said that" as being a directly responsive affirmative answer to the question.

---

*However, until we received the Fifth Circuit's May 20 order last month, we assumed no one disagreed with interpreting the C.P.A.'s words "I am certain that I said that" (emphasis added) to mean "yes, I said that". (An affirmative answer.) If the undersigned attorney may be permitted to speak on this point in the first person singular, it did not occur to me -- until I received the Fifth Circuit's May 20 order -- that there was an alternate interpretation on the table for consideration. This is probably because (1) I was present at the C.P.A.'s deposition, and (2) the government obviously has always concurred with our interpretation (probably because the government's trial attorney also was at the deposition). The government's contention was not that the C.P.A. didn't advise the taxpayer that it was not necessary to file timely. Rather, the government contended that such advice, admittedly given,

If the court reporter had merely put a semicolon (to indicate a pause, for example) rather than a comma after the words "I am

---

cannot constitute "reasonable cause" (although, the government said, advice not to file at all can). For example, the arguments made on page 13 of the government's brief in the Fifth Circuit obviously are based on the assumption that the C.P.A. said he had advised the taxpayer that (under the uncertain circumstances) it was not necessary to file timely. Applicable portions of page 13 of the government's brief are as follows:

> Therefore, taxpayers' argument (Br. 22-23, 33, 34), that reliance on a tax professional's advice that a return need not be filed by the due date constitutes reasonable cause, is incorrect. . . . Taxpayers' argument (Br. 34) that the rule, that reliance upon professional advice that a return need not be filed, should be expansively viewed to also cover situations where a tax professional feels that it would be "reasonable and proper" (Br. 37) to disregard the filing requirements of the Code, is inconsistent with the decisions in Boyle, Jackson, and Ballard.[9/]
>
> . . . .

certain that I said that" (or if she had underlined the second "<u>that</u>" for emphasis if

---

> [Footnote 9 of government brief:] Contrary to taxpayers' assertion (Br. 34-35), the District Court did not find (R. 52) that taxpayers' accountant failed to advise taxpayers that they may disregard the due dates.

Nevertheless, the Fifth Circuit, on page 2 of its May 20 order, refers to page 5 of our Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time and uses the words "misrepresent the testimony of the C.P.A." in a way that is "misleading" in regard to two places where I didn't insert asterisks or dots to indicate the omission of words after the words "I am certain that I said that." However, I inserted asterisks after other quotations of these words, which the court failed to note. I set out the first part of the C.P.A.'s answer and inserted asterisks to indicate our omission of his subsequent words on pages 12 and 35 of our opening brief in the Fifth Circuit (and similarly on pages 11 and 35 in regard to the C.P.A.'s later answer to the somewhat similar question concerning the later year). The entire question and answer were set out on page 2 of Appellants' Petition for Rehearing to the Panel, and that page was attached as ADDENDUM A (and discussed in footnote 4 on page 7) of our Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time

the witness had emphasized it), the Fifth Circuit's interpretation would be excluded, assuming acceptance of such punctuation. But court reporters (in this part of the country,

---

(to which the panel referred). On page 7 of our petition for certiorari I again quoted the C.P.A.'s answer in full, although later on page 14 I didn't (again, not imagining there was any question as to this being the agreed and proper interpretation). On the next page the remainder (after "I am certain that I said that") of the C.P.A.'s answer is referred to with the accompanying statement that it did not detract from his first words ("I am certain that I said that"). Let me state as an officer of the Court that I had no intent to mislead anyone. The panel should have expressly assumed this, inasmuch as it was obvious. The point as to what the C.P.A. intended was not in controversy, as the government obviously interpreted his testimony the same way we did. But the Fifth Circuit, in its scholarly and for the most part carefully written January 4, 1991 opinion (reported at 920 F.2d 301), did not make clear that its interpretation of the words "I am certain that I said that" excluded the possibility of ours being another reasonable interpretation.

Later, with a chance to review and reconsider its obvious and egregious error, the circuit panel should have acknowledged it.

at least) -- as we believe this Court can take judicial notice -- generally do not use semi-colons (nor underline words).

As explained in the footnote, we did not contemplate a second possible interpretation (the Fifth Circuit's) until last month when we received the Fifth Circuit's May 20 order. (We had no reason to, since the Fifth Circuit's interpretation had not previously been suggested by the appellee or the District Court.)

The proper interpretation of a contract (or other legal instrument) is generally a question of law, and if the Fifth Circuit had been interpreting a contract it presumably could have determined, as a matter of law, which version is correct. But an appellate court cannot -- in a summary-judgment case -- choose between two plausible interpretations of <u>factual testimony</u> with finality. For such a <u>factual</u> matter is for the jury to decide.

In a summary-judgment case, where from the evidence there is a legitimate interpretation or reasonable inference favorable to the non-movant/appellant, his version must be accepted. (See the cases discussed in footnote 5 on pages 17-20 of appellants' petition for certiorari.)

Here, the appellants' interpretation is not merely possible, it is totally logical. It was uncontested by the government. It is at least as likely (we contend more likely) to be correct as the Court's version. It is the only one of the two versions that is grammatically and structurally correct (with or without the court reporter's commas). On the other hand, the Fifth Circuit's interpretation is grammatically and structurally incorrect for several reasons:

(1) For the Fifth Circuit's interpretation to be grammatically correct, there are too many "that"s (either the second or

third "that" being redundant). The Fifth Circuit does not expressly admit that appellants' interpretation is the only grammatically correct one; however, as noted above, the court acknowledged there is one "that" too many for its own interpretation to be grammatically correct. (See p. 4, lines 5-6 of its May 20 order, referring to the C.P.A.'s "repeating the word 'that' . . . .").

(2) Secondly, the circuit court's interpretation is structurally incorrect. It involves another redundancy -- a more significant one. The trouble with the Fifth Circuit's interpretation is that, just as there is one "that" too many, there is one entire clause too many. For, if the circuit court's interpretation were correct, one of the C.P.A.'s two clauses, "I am certain that I said that" and "I think it was conveyed to him", would appear redundant, in covering the

same thing. The witness probably would not have said basically the same thing twice.

(3) There might well be a third problem with the circuit court's interpretation: namely, an inconsistency between the words "I am certain" and "I think", if the two clauses quoted in the preceding paragraph both referred to the same thing.

(4) A fourth shortfall of the circuit court's interpretation is that, by it, there would be no direct answer (i.e., affirmative or negative) to a question that called for an affirmative or negative answer.

On the other hand, appellants' interpretation does not involve these or any other grammatical or structural errors. According to appellants' interpretation, the C.P.A.'s first words "I am certain that I said that" were directly responsive to the question, and answered it affirmatively.

At first glance it might appear superficially that the C.P.A.'s answer to a later question concerning the return for the subsequent year (1979) conforms with the Fifth Circuit's interpretation, since the C.P.A.'s answer does not expressly begin with a simple affirmation that he had advised delayed filing, as (according to our interpretation) his answer to the question concerning the 1978 return did. But the later question was asked somewhat differently. The later question and answer (Sweeney dep. 18-19) were as follows:

> Q Did you advise Mr. Denenburg that there was <u>some reason why</u> it was not necessary to file the 1979 income tax return on or before the due date? [Emphasis supplied.]
>
> A I know that I reiterated the same statement that I had made the prior year with the '78 return, that to file a return that was based on the documents would result in substantial income tax impact and would require amended returns for the corporation for both years, and that the only practical way to solve the matter was to get the amended

> documents. But we would not file a return unless we saw those amended documents.

Instead of asking (as the earlier question did) "Did you . . . advise Mr. Denenburg . . . that it was not necessary to [timely] file . . . for some reason" (emphasis added), the question concerning the later year focused on the reason for the advice, as distinguished from simply asking whether the advice itself had been given. Hence the C.P.A.'s answer to the later question began with his giving the reason for his advice (obviously implying that he had advised delayed filing), rather than with an affirmative (or negative) statement as to whether he had advised that it was not necessary to timely file. Certainly a reasonable inference, considering both questions and answers, is that the C.P.A. intended his answer to the later question (as to the 1979 return) to be an affirmative answer to that

question. Like many other accountants when testifying, his statement included not only the responsive answer itself but also an explanation.

Summary of Part A

For clarification we repeat that we concede that the circuit court's interpretation is an arguably possible one. And we repeat that appellants' position is that appellants' interpretation of the C.P.A.'s words "I am certain that I said that" is a logical and reasonable interpretation which, therefore, a jury could opt for; thus, on an appeal from a summary judgment, the appellants' version must be accepted. (In its May 20 order, p. 3, the circuit panel acknowledged that if the appellants' interpretation of the C.P.A.'s words were correct, "this court might likely have ruled differently.")

But the circuit court affirmed the government's summary judgment on the basis of the circuit court's own interpretation of the C.P.A.'s deposition testimony. That second possible interpretation is one for which neither side had contended or apparently even contemplated, probably because their attorneys had heard the C.P.A.'s testimony and understood what he probably meant. Left to its own lights the Fifth Circuit made a legally indefensible decision, in absolutely excluding, as another possible interpretation, the appellants' at least equally logical interpretation of the C.P.A.'s deposition testimony.

B.

THE IMPORTANCE OF THE SECOND QUESTION (AS WELL AS THE FIRST) PRESENTED IN OUR PETITION FOR CERTIORARI REMAINS UNDIMINISHED

The second of the two questions presented in appellants' petition for certiorari asks --

> Whether an appellate court, in affirming a summary judgment, may refuse to accept the deposition testimony of the appellants' witness on the key question of fact.

The Fifth Circuit's holding obviously flouts a basic summary-judgment rule of law (again, see the cases discussed in footnote 5, pp. 17-20, of our petition for certiorari), that where a reasonable inference from the evidence favors the non-movants (appellants, here) it must be accepted.

CONCLUSION

The Fifth Circuit's interpretation of the C.P.A.'s words "I am certain that I said that" is only one of two logical interpretations. The question of which interpretation was intended cannot be resolved at the appellate level against the appellants on their appeal from a summary judgment, because all reasonable inferences from the evidence must be resolved in their favor. The question of

which of the two possible meanings the C.P.A. intended must therefore be submitted to a fact-finder.

Why the Fifth Circuit would be so oblivious to what, we believe, would be obvious to 100 out of 100 other intelligent persons escapes us.

Since:

(1) the appellants' interpretation of the deposition testimony is reasonably possible and therefore a justifiable inference; and

(2) it is favorable to the taxpayers who are appealing from a summary judgment,

reversal of the Fifth Circuit's decision (improperly based on a factual finding) is automatic.

JOHN A. BAILEY
2000 Post Oak Blvd., #1760
Houston, Texas 77056
(713) 626-5051
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Supplemental Brief of the Appellants have been served this 26th day of June, 1991, by United States Mail, postage prepaid, addressed to:

Hon. Kenneth W. Starr
Solicitor General
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044

JOHN A. BAILEY

APPENDIX G

[FILED MAY 20, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and wife,
SANDRA J. DENENBURG,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

BEFORE GARWOOD and WIENER, Circuit Judges, and VELA*, District Judge.

B Y T H E C O U R T :

IT IS ORDERED that appellants' suggestion for reconsideration of the court's previous order of April 22, 1991, denying

---

*District Judge of the Southern District of Texas, sitting by designation.

appellants' motion for leave to file out of time suggestion for rehearing en banc is DENIED. Just as was the case with appellants' previous motion for leave to file a suggestion for rehearing en banc out of time, we lack jurisdiction to hear the instant motion. Henceforth the clerk of this court shall not accept any attempted filings by or on behalf of appellants in this matter.

Nonetheless, in as few words as possible, this court shall try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal. Possibly this third effort to do so shall have the proverbial charm.

This court has not, as counsel suggests, rejected or discredited the taxpayers' CPA's plain answer to a "key question" of this case; neither have we refused to accept such testimony. Rather, counsel has misinterpreted the court's reading

of the CPA's testimony--admittedly quite different from counsel's reading--as rejecting such testimony. This court has, however, relied heavily on the total testimony of the CPA in his affidavit and in his deposition.

Counsel continues to misinterpret the testimony of the CPA. Most telling, on page 5 of counsel's Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time, he transforms--to a degree closely approaching sanctionability--the initial clause of the understandably long, disjointed and rambling answer in the CPA's deposition, into a complete sentence by replacing the initial comma with a period, omitting the required ellipsis, and closing the quotation immediately following the period. Not only is that treatment erroneous, but it is grossly misleading.

The question posed to the CPA in his deposition was, "Did you ever advise [the

taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" A person unfamiliar with the entire deposition or, for that matter, unfamiliar with the CPA's full reply to that question, would, upon reading counsel's shameless transformation of the initial clauses of the CPA's response, assume (as counsel apparently intended) that the CPA answered the question in the affirmative, without qualification. That the CPA answered affirmatively is simply not the case.

Counsel tries to influence the unfamiliar reader to view the improperly truncated clauses as a complete sentence--as though the second "that" were the object of the verb "said" and, more importantly, as an informal, conversationally shortened substitute for the noun clause ". . . that it was not necessary to file the return on time for some reason." Had the CPA's answer been as

thus misrepresented, counsel would be correct and this court might likely have ruled differently. But counsel's version is not what the CPA said.

A proper analysis of the CPA's answer reveals first that the CPA did not truly respond to the question, and second that, by being unresponsive and somewhat evasive, the CPA was actually answering in the negative. The CPA began his response with "I am certain that I said . . ." followed by "that" as the beginning of a noun clause. But, before he completed the noun clause, the CPA inserted the parenthetical, independent clause "and I think it [i.e., what he said] was conveyed to him [the taxpayer], . . ." Having thus interjected the parenthetical thought about whatever he had said having been told to the taxpayer, the CPA completed his answer by repeating the word "that" and finishing the noun phrase as follows: "because of

the substantial variation in the way the document was written with the way the books were returned at the corporation, that to file a return, that was materially--and we knew it to be incorrect--was certainly not what we would as a firm propose to do."

But when we translate the CPA's answer from "deposition-ese" and delete the independent clause, his response reads as follows:

> I am certain I said that to file a return which was materially incorrect, because of the substantial difference between the way the document was written and the way that the books were maintained at the corporation, was certainly not what we, as a firm, would propose to do.

As thus grammatically and syntactically reconstituted, the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that, as a matter of tax law, they need not file a return timely.

Conversely, our interpretation of the CPA's answer is supported by reading it in the context of his entire deposition.

Counsel's insistence to the contrary notwithstanding, this court did apply the well recognized standard of review for summary judgment cases by viewing the summary judgment evidence in the light most favorable to the non-movant--but reading it realistically nonetheless.

We close with a caution to counsel for the taxpayers: We admire the fervor with which he has represented his client in this case and the tenacity with which he has refused to take "No" for an answer. But we suggest that henceforth counsel temper his fervor and tenacity with professional objectivity and with consent awareness of his role as an officer of this court, particularly when, in briefs and memoranda, he represents quotations as true and complete, as well as

when he characterizes the action of the court pejoratively.